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Presiding Justices 514Other Judges 514Clerk-Magistrates 513CPOs/POICs 510

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M E M O R A N D U M

TO: All District Court Judges, Clerk-Magistrates and Chief Probation Officers
FROM: Chief Justice Zoll
DATE: August 10, 1994
SUBJECT: New law regarding bail and "dangerousness"

I. General

On July 14, 1994, the Governor signed Chapter 68 of the Acts of 1994, "An Act Relative to the Release on Bail of Certain Persons" (hereinafter "Chapter 68"). The legislation did not have an emergency preamble and is believed to be effective in 30 days, i.e. on Saturday, August 13, 1994. The first court day on which the law will be implemented will thus be Monday, August 15, 1994.

Given its important implications and detailed requirements and procedures, Chapter 68 should be carefully reviewed by all those who are involved in its implementation. A copy of the law accompanies this memo. The purpose of this memorandum and attached forms is to provide a summary of the new procedures and a basis for orderly implementation. Chapter 68 raises important substantive and procedural issues. Many of these issues will have to be addressed as the need arises and, if necessary, resolved by means of legislative amendment or the appellate process.

The title of Chapter 68, "An Act Relative to the Release on Bail of Certain Persons," may be misleading. As explained below, the legislation makes some important changes in existing bail procedures, but also adds an entirely new procedure

by which the court, on motion of the Commonwealth, can decide the issue of pretrial release based on the defendant's alleged "dangerousness." Thus, as a result of Chapter 68, there are two different proceedings regarding pretrial release. A bail decision on pretrial release proceeds under G.L. c. 276, s. 58 and is limited solely to the issue of likelihood of the defendant's court appearance. A pretrial release procedure based on an allegation of dangerousness proceeds under a new s. 58A of G.L. c. 276 and can involve either (1) the imposition of terms of release to eliminate the danger and ensure defendant's appearance, or (2) pretrial detention, if the court finds that there are no release terms that will reasonably prevent the danger. The new s. 58A procedure is available only for certain crimes.

II. Changes in Bail Proceedings

Chapter 68 makes several changes in the bail provisions in G.L. c. 276, s. 58. The first change is that no bail hearing, as such, is required at arraignment if the prosecution moves for a dangerousness hearing under s. 58A. However, as explained below, it would appear that a bail hearing may be held at arraignment before a s. 58A motion is filed.

Chapter 68 also eliminates dangerousness as a consideration in determining bail in a s. 58 hearing. As you know, in 1993 the Supreme Judicial Court ruled that the present statutory provision making dangerousness a bail consideration is unconstitutional. Aime v. Commonwealth, 414 Mass. 667 (1993). Chapter 68 restores the pre-1992 language that mandates release of an arrestee on personal recognizance without surety unless a judicial officer determines, in the exercise of his or her discretion, "that such a release will not reasonably assure the appearance of the prisoner before the court." The presumption in favor of personal recognizance can be overcome based on the 18 factors listed in s. 58. (These factors are listed on the current "Reasons for Bail" form, DC-CR-6).

Chapter 68 preserves the requirement in s. 58 that an explicit condition of any release on bail must be that, if the prisoner is charged with a crime during the period of that release, bail may be revoked. However, the new law adds the requirement that the court "enter in writing on the court docket" that the defendant was told about the possibility of bail revocation, and that the docket entry "shall constitute prima facie evidence that the prisoner was so informed." G.L. c. 276, s. 58, third par.

Chapter 68 also provides that bail revocation based on the charge of a new crime is to proceed in the court "before which the prisoner is charged with committing a subsequent offense." G.L. c. 276, s. 58, third par. In effect this provision establishes the concept of intercourt bail revocation, that is, action can be taken in a case even though that case is pending in another court. Formerly, a bail revocation

hearing based on a new alleged crime had to be conducted in the court that had ordered the bail and at which the earlier case was pending.

Chapter 68 appears to require the "new" court to proceed with the bail revocation. The bail revocation hearing "shall be held upon the prisoner's first appearance before the court before which the prisoner is charged with committing an offense while on release pending adjudication of a prior charge, unless that prisoner, or the attorney for the Commonwealth, seeks and the court allows, a continuance because a witness or document is not immediately available." G.L. c. 276, s. 58, third par. The maximum continuance of the revocation hearing is seven days at the prisoner's request and three days at the Commonwealth's request, except for good cause. During the continuance, "the prisoner may be detained consistent with the provisions of s. 58," i.e. a bail proceeding. Chapter 68 does not change the current provisions requiring (1) a finding of probable cause for the new crime and (2) a determination of whether release "will seriously endanger any person or the community." If the court finds probable cause and dangerousness in accordance with the terms of the law, the court may revoke bail on the prior charge and order the prisoner held without bail pending adjudication for the prior charge for up to 60 days.

One problem with this bail revocation proceeding in the "new" court is that it will be moot if the defendant is held on bail or in pretrial detention on the new charge. Moreover, the fact that the alleged new crime was committed while the defendant was on pretrial release on an earlier charge is an express factor to be considered for the bail or dangerousness decision on the new charge. For these reasons, a court may decide to defer on the revocation issue until the question of release on the new charge is resolved.

III. The New Law on "Dangerousness"

Chapter 68 adds a new s. 58A to G.L. c. 276. This section establishes a new procedure for determining pretrial release based on the defendant's dangerousness. It is not clear whether this procedure is available in juvenile delinquency as well as criminal proceedings.

The proceeding is to be commenced by a motion filed by "the attorney for the Commonwealth." The hearing on the motion must be held "immediately upon the prisoner's first appearance before the court," unless a continuance is allowed. G.L. c. 276, s. 58A(4). This provision at least implies that the motion should be filed at arraignment, though there is no express requirement for this and no express prohibition against filing the motion after arraignment.

It also appears that the s. 58A proceeding is inapplicable to out-of-court pretrial release decisions. It is important for clerk-magistrates and assistant clerks who are authorized to admit to bail to be aware, while making out-of-court pre-trial release decisions, whether the crime charged is one that can result in a pretrial detention motion under s. 58A. The possibility of pretrial detention may be relevant to the issue of a defendant's likelihood of appearance at arraignment and thus relevant to the decision on bail or personal recognizance.

In any event, it should be kept in mind that only judges can order out-of-court pretrial release for defendants charged with (1) violation of protective orders issued under G.L. c. 209A; c. 208, ss. 18, 34B or 34C; c. 209, s. 32; or c. 209C, ss. 15 or 20, or (2) any crime involving "abuse" as defined in G.L. c. 209A, s. 1, allegedly committed while a c. 209A protective order was in effect against that defendant.

It is not clear whether a s. 58A proceeding can be conducted by a clerk-magistrate or assistant clerk who is making a pretrial release decision during court hours under G.L. c. 221, s. 62C(h), for example, on a day in which no judge is scheduled to sit in that court.

Section 5 of Chapter 68 amends G.L. c. 276, s. 58 by adding the requirement that a "judge" conduct a s. 58A hearing. Similarly, section 6 of Chapter 68 provides in new s. 58A(2) that the required motion be made when the defendant appears before a District Court "judge." New s. 58A(4) also refers to the s. 58A hearing being held by a "judge." On the other hand, new s. 58A(2) refers to the hearing being held and the order being issued by a "judicial officer."

In any event, the motion under s. 58A appears to be limited to defendants who are "held under arrest . . ." G.L. c. 276, s. 58A(4). Thus, defendants released from custody prior to court appearances may not be subject to the new proceeding.

The new proceeding is available only for specific crimes, namely:

felony offenses that have as an element of the offense the use, attempted use, or threatened use of physical force against the person of another;

any other felony that by its nature involves a substantial risk that physical force against the person of another may result, including the crimes of burglary and arson whether or not a person has been placed at risk thereof;

violations of protective or restraining orders under G.L. c. 208, s. 18 (protective or restraining orders issued in divorce actions);

violations of orders to vacate the marital home issued in divorce actions under G.L. c. 208, ss. 34B or 34C;

violations of protective orders under G.L. c. 209, s. 32 (prohibiting restraint of personal liberty of spouse);

violations of orders issued under G.L. c. 209A, s. 3 (vacate, no-contact, no-abuse, and restraining orders against family or household members);

violations of orders issued under G.L. c. 209A, s. 4 (ex parte temporary restraining orders);

violations of orders issued under G.L. c. 209A, s. 5 (emergency ex parte orders);

violations of orders issued under G.L. c. 209C, ss. 15 or 20 (support, custody, visitation, protection orders in paternity cases);

misdemeanors or felonies involving abuse as defined in G.L. c. 209A, s. 1 for which the defendant has been arrested while a protective order issued under c. 209A was in effect against the defendant;

drug offenses with mandatory minimum sentences of three years or more (e.g. G.L. c. 94C, s. 32(b), s. 32A(d), s. 32E(a)(2)-(a)(4), s. 32E(b)(1)-(4), s. 32E(c)(1)-(4), s. 32F(a), (b), (d), s. 32K);

"a third or subsequent conviction" of drunk driving under G.L. c. 90, s. 24.

Note that a misdemeanor involving "abuse" (e.g. "domestic A & B") where no c. 209A order is in effect against the defendant and the offense of threat to commit a crime (G.L. c. 275, s. 2) are not crimes for which a s. 58A motion would appear to be available.

The motion may request either an order of pretrial detention, or release on conditions. The statute lists 17 factors for the court to consider in making the pretrial release decision based on dangerousness. The judge must make this determination "on the basis of any information which he can reasonably obtain" G.L. c. 276, s. 58A(5). After the hearing the court must issue (1) an order for pretrial detention, (2) an order of release on conditions, or (3) an order of release on personal recognizance without surety.

If the court determines that personal recognizance "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community," the court must order the pretrial release of the person subject to conditions. One condition must always be imposed, i.e. that the defendant must not commit a federal, state or local crime during the period of release. Other conditions must be imposed to reasonably assure the appearance of the defendant, as required, and the safety of any other person and the community. These conditions must be the least restrictive necessary to accomplish these ends. The statute lists 14 other possible conditions including the imposition of "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."

Section 58A(3) states that "nothing in this section shall be interpreted as limiting the imposition of a financial condition upon the prisoner to reasonably assure his appearance before the courts" (emphasis added). However, this same subsection and s. 58A(2)(B)(xiv) also provide that the court "may not impose a financial condition that results in the pretrial detention of the person" (emphasis added). Thus it would appear that a monetary condition may be imposed as a condition for release under s. 58A as long as that condition is intended to assure appearance, even if the defendant must be held on pretrial detention because he or she cannot or will not meet the condition.

If a defendant is ordered released on terms after a hearing on dangerousness under s. 58A, that order may be revoked if any of the terms is violated. The procedure for such revocation, and for custody during any continuance of the revocation hearing, is provided in s. 58B, another new section added to G.L. c. 276. This revocation hearing is complex, involving specific determinations, rebuttable presumptions and detention while the matter is pending.

If after the s. 58A hearing the court finds that no conditions of release will reasonably assure the safety of any other person or the community, the court must order the defendant to pretrial detention. G.L. c. 58A(3)(first sentence).

IV. Procedures for the s. 58A Motion, Hearing And Order

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1. The motion.

If the "attorney for the Commonwealth" decides to file a motion for a hearing on dangerousness under s. 58A, the motion should be in writing and should specify the charge that gives the court the jurisdiction to conduct the hearing, and a copy of the motion should be given by the prosecutor to the defendant.

2. Relationship to bail proceeding.

As stated above, it would appear that the court's obligation to proceed with a bail hearing under G.L. c. 276, ss. 57 and 58 may be preempted if the prosecution files a motion under s. 58A. However, it would also appear that the issue of bail can be addressed under s. 58 at arraignment before a s. 58A motion is filed.

If bail is set in the District Court and the defendant is held in lieu of bail, the defendant may be released if bail is "made" at the place of detention. It is not clear whether the Commonwealth may file a s. 58A motion after the arraignment is concluded: the hearing on a s. 58A motion "shall be held immediately upon the prisoner's first appearance before the court" unless a continuance is allowed. G.L. c. 276, s. 58A(4). Thus if the prosecution does not file the motion and the defendant is released from the place of detention by posting bail, it may be too late to file the s. 58A motion. On the other hand, there would appear to be no basis for the Commonwealth to file a s. 58A motion at the time a defendant is held in lieu of bail so as to bring the defendant back to court for the s. 58A hearing if and when he posts bail at the place of detention.

If the District Court sets bail, the prosecution may file the s. 58A motion regardless of whether the defendant can post the amount. The hearing on the motion will proceed, with an order to release on terms (one term possibly being a monetary amount to ensure appearance) or pretrial detention, as the court may determine.

If bail is set, and the defendant appeals to Superior Court, it would appear that the s. 58A motion can be filed in Superior Court if the bail is reduced and the defendant "makes bail."

3. Proposed order forms.

Before the hearing begins, the court should have before it a copy of the appropriate form of order. Two forms have been prepared for interim use, one for pretrial detention and one for release on terms. Copies of these forms accompany this memo. The motion will usually determine which of the order forms is appropriate, although in some cases the prosecution may move for an order of pretrial detention and the court may determine that an order for release on terms (or personal recognizance) is required.

As the hearing proceeds, the judge should use the form to record (by check mark or "X" in the appropriate box) any finding that it has made on any of the listed reasons for determining dangerousness. Lines have been provided for any case-specific facts associated with the listed reasons. For an order for release on terms,

the form provides for an indication of those terms. Note that if the court imposes a financial condition, the relevant language at items 11 and 12 on the form indicates that this condition is imposed only to assure the defendant's court appearance.

4. Submission of the forms by the prosecutor as proposed orders.

One approach that can be adopted is for the prosecution to fill out the appropriate order form in advance and submit it to the court as a "proposed order," along with the motion for a hearing. This will enable the prosecution to select those reasons for dangerousness which it will seek to prove by clear and convincing evidence, and to provide any case-specific objective information in the appropriate space (e.g. the sentence faced by the defendant for the crime charged, if that is one of the grounds for the dangerousness finding which the prosecution seeks).

The defense may wish to propose an order for release on terms as an alternative to pretrial detention if it is unsuccessful in opposing a finding of dangerousness.

The judge can work from the proposed order, make any additions or alterations, and sign it after the hearing, if he or she decides to issue the order; or the court can use a proposed order as a guide and complete a blank form to record its findings, which obviously may vary from those proposed by the prosecution.

This "proposed order" approach can be particularly useful for an order for release on terms where the prosecution and defense counsel have agreed to terms before the hearing begins. Those terms can be indicated on the order form as proposed, and the judge can provide any additional reasons and sign the order if it is to be issued.

5. The hearing

The requirements of the s. 58A hearing are set forth in s. 58A(4). If the Commonwealth makes the motion based on dangerousness, the hearing must be held "immediately upon the prisoner's first appearance before the court, unless the prisoner, or the attorney for the Commonwealth, seeks a continuance." A continuance at the request of the defendant may not exceed seven days; a continuance at the request of the Commonwealth may not exceed "three business days." Either of these limits can be exceeded "for good cause." During a continuance, the defendant "shall be detained upon a showing that there existed probable cause to arrest" him or her. Note that probable cause for the arrest may already have been determined pursuant to the Jenkins procedure.

At the hearing, the defendant has the right to counsel, to testify, to present witnesses, to cross-examine witnesses who appear, and to present information. The rules of evidence do not apply. In order to order pretrial detention, the judge must find, based on facts supported by clear and convincing evidence, that no conditions will reasonably assure the safety of any other person, or the community. The other components of the pretrial detention order, as required by the statute, are set forth on the order form.

The hearing may be "reopened" before or after a finding on pretrial detention if the court finds that information exists that "was not known at the time of the hearing and that has a material bearing on the issue" This "reopening" of a hearing should be distinguished from a continuance. For example, if the prosecution files its motion and presents information that the court determines, after a hearing, is legally sufficient for the issuance of an order for pretrial detention or release on terms, the order may issue immediately. However, if the court finds that the prosecution has failed to provide sufficient evidence, it may decide to continue the matter to allow the Commonwealth to obtain information that may not have been available at the time of arraignment. In the latter case, the motion is not denied subject to "reopening" as provided above. Rather the hearing is continued, with the defendant held in custody, as provided in the statute, during the continuance. The continuance may be for later the same day or to a future day (but no more than three days without a showing of "good cause").

Presumably, each District Attorney will develop policies concerning when s. 58A motions will be filed and how the prosecution will present evidence in support of the motion, e.g. whether a police report or police testimony will be presented as needed.

6. Witnesses

As stated above, the defendant has the statutory right to call witnesses. G.L. c. 276, s. 58A(4). However, it may be possible for the court to request an offer of proof as to the testimony of a proposed witness. If the proposed testimony, even if accorded total credibility, would be irrelevant to the issue of dangerousness, then the proposed witness might not be available as a matter of right.

7. Appeal

The new s. 58A contains a subsection governing appeal to Superior Court. This procedure is virtually identical to the provisions for appeal of a bail decision to Superior Court under s. 58. The same requirements are repeated regarding the filing of a petition, the papers to be transferred, telephone notices that must be given, the

obligations of the probation office regarding transfer of the defendant's criminal record to Superior Court, etc.

The only variance in s. 58A appears to be that for appeal under that section, the defendant must be brought before the Superior Court "within two business days of the petition being filed." For bail appeals under s. 58, the defendant must be brought before the Superior Court "on the same day the petition shall have been filed, unless the district court or the detaining authority shall determine that such appearance and hearing on the petition cannot practically take place before the adjournment of the sitting of said superior court for that day and in which event the petitioner shall be caused to be brought before said court for such hearing during the morning of the next business day of the sitting of said superior court."

Of course, in an appeal under s. 58A a copy of the order being appealed, rather than a bail recognizance and "Reasons for Bail," will be sent to Superior Court.

The Superior Court must make its decision within five business days of the date the petition was filed. The Superior Court judge "may consider the record below which the Commonwealth and the prisoner may supplement." The reference to "record" would appear to mean the case papers transferred to Superior Court and the District Court order, which contains findings and reasons.

IV. Other Changes

Chapter 68 also makes other changes in existing law. It amends G.L. c. 276, s. 82A by raising the penalty for "bail jumping" (i.e. not appearing in court in accordance with bail or recognizance). Currently that penalty is a fine of not more than \$1,000 or imprisonment in a house of correction for not more than one year, or both, with a proviso that neither the fine nor imprisonment may exceed the maximum penalty for any crime for which the appearance was required. The new penalty is as follows: for misdemeanors, not more than \$20,000 or imprisonment in a house of correction for not more than one year, or both; and for felonies, a fine of not more than \$50,000 and imprisonment in a state prison for not more than five years, or a house of correction for not more than two and one-half years, or by fine and imprisonment. In addition, imprisonment imposed under this section must be consecutive to any other sentence of imprisonment imposed for the crime for which the defendant failed to appear.

Finally, Chapter 68 replaces current s. 8B of G.L. c. 279 with new provisions requiring that if a defendant released under G.L. c. 276, s. 58 (i.e. on bail or personal recognizance) commits a crime, the sentence imposed for that crime must run "consecutively to the earlier sentence for the crime for which he was on release."

**ORDER OF
CONDITIONAL RELEASE
ON FINDING OF "DANGEROUSNESS"
G.L. c. 276, §58A**

DOCKET NO. _____

**Trial Court of Massachusetts
District Court Department**



COURT DIVISION _____

COMMONWEALTH VS. _____

NAME OF DEFENDANT _____

**ORDER OF CONDITIONAL RELEASE
FINDINGS, REASONS AND RELEASE CONDITIONS**

Following the Commonwealth's motion pursuant to G.L. c. 276, §58A(2), and after a hearing conducted in accordance with G. c. 276, §58A(4) & (5), I FIND that the defendant's release on personal recognizance alone will not reasonably assure the appearance of the defendant as required or will endanger the safety of another person or the community. G.L. c. 276, §58A(2). I THEREFORE IMPOS THE FOLLOWING CONDITIONS, listed herein at Section III, which I find are the least restrictive conditions that will reasonably assure th appearance of the defendant as required and the safety of all other persons and the community. G.L. c. 276, §58A(2)(B).

The Court's reasons for imposing these conditions are listed below as the items marked in Section I. See G.L. c. 276, §58A(5). Further explanation, if necessary, appears in Section II.

SECTION I

The Court's REASONS for imposing conditions of release are those marked below:

- 1 ☐ The defendant is charged with an offense designated in G.L. c. 276, §58A(1) _____
- 2 ☐ The nature and seriousness of the danger posed to any person or to the community that would result in the defendant's release

- 3 ☐ The nature and circumstances of the offense charged _____
- 4 ☐ The potential penalty the defendant faces _____
- 5 ☐ The defendant's family ties

- 6 ☐ The defendant's employment record

- 7 ☐ The defendant's history of mental illness

- 8 ☐ The defendant's reputation

- 9 ☐ The risk that the defendant will obstruct or attempt to obstruct justice or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror _____
- 10 ☐ The defendant's record of convictions _____
- 11 ☐ The defendant's record for illegal drug distribution _____
- 12 ☐ The defendant's present drug dependency _____
- 13 ☐ The defendant is on bail awaiting adjudication of a prior charge _____
- 14 ☐ The acts alleged in this case involve abuse as defined in G.L. c. 209A, §1, or a violation of a temporary or permanent order issued pursuant to G.L. c. 208, §§18 or 34B; G.L. c. 209, §32; G.L. c. 309A, §§3,4 or 5; or G.L. c. 209C, §§15 or 20.
- 15 ☐ The defendant has a history of orders issued against him or her pursuant to the statutes listed in item 14 _____

- 16 ☐ The defendant is on probation, parole, or other release pending completion of a sentence for any conviction.
- 17 ☐ The defendant is on release pending sentence or appeal for any conviction.

SECTION II

Additional findings of fact and further explanation if necessary (reference may be made to numbered items in Section I):

SECTION III CONDITIONS

Required in all orders: The defendant will not commit a federal, state or local crime during the period of release. Should the defendant commit a violation of this or any other condition imposed by this order, the order may be revoked and the defendant ordered to pretrial detention. G.L. c. 276, §58B.

- 1 ☐ The defendant will remain in the custody of _____, who agrees to assume supervision and report any violation of a release of condition to this Court, and is able reasonably to assure the Court that the defendant will appear as required and will not pose a danger to the safety of any person or the community
- 2 ☐ The defendant will maintain or actively seek employment;
- 3 ☐ The defendant will maintain or commence an education program;
- 4 ☐ The defendant will abide by the following specific restrictions on personal associations, place of abode or travel:

- 5 ☐ The defendant will avoid all contact with the alleged victim(s) of the crime charged and with any potential witness(es) who may testify concerning the offense: _____;
- 6 ☐ The defendant will report on a regular basis to the following law enforcement agency, pretrial service agency, or other agency as follows: _____;
- 7 ☐ The defendant will comply with the following curfew: _____;
- 8 ☐ The defendant will not possess a firearm, destructive device, or other dangerous weapon;
- 9 ☐ The defendant will refrain from the excessive use of alcohol or any use of a narcotic drug or other controlled substance, without a prescription from a licensed medical practitioner;
- 10 ☐ The defendant will undergo available medical, psychological, or psychiatric treatment, or treatment for drug or alcohol dependency and/or remain in a specified institution if required for that purpose, as follows: _____;
_____;
- 11 ☐ The defendant will execute an agreement to forfeit, upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure his or her appearance as required, and shall provide the Court with proof of ownership and the value of the property along with information concerning existing encumbrances as required by the Court [see separate agreement attached hereto];
- 12 ☐ The defendant will execute a bail bond with solvent sureties who will execute an agreement to forfeit such amount, in the sum of _____, reasonably to assure the defendant's appearance as required, such surety to be qualified in accordance with G.L.c.276, §58A(2)(B)(xii).
- 13 ☐ The defendant will return to the custody of _____ for the following hours after release for employment, schooling or limited purpose, as follows: _____;
- 14 ☐ The defendant will satisfy the following other conditions: _____

DATE

JUSTICE